ventional argument of public policy has in other situations, in the case of a witness willing to testify to the infidelity of a spouse it becomes almost grotesque.[6] But if the witness is unwilling, there would seem to be in this instance a valid reason for excusing him. No rights of third parties are involved, and the right of the state to secure a conviction should be subordinated to the desire of the witness, for his own sake or the sake of his children, to condone the offense. Though the point appears never to have arisen, it is highly improbable that the testimony would ever be compelled.[7]

CONVEYANCE OF LAND UPON AN ORAL TRUST. — When land is conveyed upon an oral trust, the grantee, who refuses to perform his promise under the protection of the Statute of Frauds, is by the English courts made a constructive trustee for the grantor.[1] In the United States, however, he may repudiate his unenforceable obligation and keep the land upon payment to the grantor of its fair market value.[2] But if the conveyance was induced by fraud a constructive trust arises. And on account of the harshness of the general American doctrine, a ready disposition to find fraud from the circumstances of the case or the relation of the parties is manifested. Thus, even though the conveyance was not actively induced, a present intention not to execute the trust constitutes sufficient fraud to vitiate the transaction, and the subsequent repudiation is evidence of a fraudulent purpose at the outset.[3] Similarly, where a confidential relation exists between the parties, the transaction is presumed to be fraudulent.[4] Just what constitutes confidential relations is somewhat in dispute. There is, for example, a square conflict whether a conveyance to a wife upon an oral trust is ground for equitable intervention.[5] The tendency of the courts, however, is illustrated by a recent Nebraska decision. The plaintiff, who owned a half-interest in land, conveyed his share to his co-owner upon an oral agreement by the latter to reconvey. He was allowed to recover his interest on account of the fiduciary relation between the parties. *Koefoed* v. *Thompson*, 102 N. W. Rep. 268.

The basis of the American rule seems to be the conception that to raise a constructive trust, as the English courts do, would be to go directly in the teeth of the Statute of Frauds. Of course, where the transaction is tainted with actual fraud, the statute does not apply and restitution is the ordinary equitable remedy. To imply fraud, however, from the relation of the parties is simply to use a fiction to avoid the application of an unpalatable doctrine. The injustice of allowing the grantee unduly to enrich himself, is recognized by charging him with the value of the land. This is a direct admission that he has received something which he is not entitled to keep, and it is, therefore, difficult to see why restitution is not the proper remedy.[6]

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[6] See State *v.* Briggs, 9 R. I. 361.

[7] The question could not, of course, arise in states where the indictment can be brought only on the complaint of the husband or wife.

[1] Davies *v.* Ottley, 35 Beav. 208; *In re* Duke of Marlborough, [1894] 2 Ch. 133.

[2] Burt *v.* Wilson, 28 Cal. 632.

[3] *Cf.* Brown *v.* Doane, 86 Ga. 32.

[4] Wood *v.* Rabe, 96 N. Y. 414.

[5] See Brison *v.* Brison, 75 Cal. 525. *Contra*, Brock *v.* Brock, 90 Ala. 86.

[6] See Dickerson *v.* Mayo, 60 Miss. 388.

In the analogous cases, where a deed absolute on its face is in fact given by way of mortgage, the American courts enforce the parol agreement.[7] The Wisconsin court, in a leading decision, frankly admits that these cases are indistinguishable, but regards them as an encroachment upon the Statute of Frauds, and refuses to extend the exception.[8] To consider the creation of a constructive trust in cases of this class as a judicial contravention of an express statute seems to be a misconception. The oral trust is given no more weight under these circumstances than in the case of fraud. The grantee may repudiate his express promise with impunity, but in so doing he should not be allowed to enrich himself unjustly at the grantor's expense. Equity therefore fastens upon him a new obligation to return what it is unconscionable for him to keep. This new obligation is a constructive trust, expressly excepted from the operation of the Statute of Frauds. It is raised upon the same principle that creates a resulting trust where property is given upon an express trust which proves to be void. When the oral trust is for the benefit of a third party, a constructive trust for the grantor can hardly be said to contravene the Statute; when the oral trust is for the benefit of the grantor himself, the mere fact that relief by restitution achieves a result identical with that of enforcing the oral trust should be immaterial.[9] The right ought not to be confused with the remedy.

TRANSFER OF ACCOMMODATION PAPER AFTER MATURITY. — Although it is well settled that the transferee of a bill or note after maturity takes it subject to all equitable defenses existing against his transferrer at the date of transfer, there is a sharp conflict as to the rights of the holder of accommodation paper which has not been negotiated until after maturity. By the prevailing American doctrine he is denied relief against the accommodating party;[1] but the English courts allow him to recover.[2] The English law is followed in Maine and Illinois, and has been recently approved in Connecticut.[3] *Mersick* v. *Alderman*, 60 Atl. Rep. 109. The reason sometimes given in support of the American decisions, namely, lack of consideration,[4] is obviously unsound, for it would be equally applicable to cases where the transfer is made before maturity to one who had notice of the nature of the instrument, and would virtually contravene the very purpose of accommodation papers. The extent of the liability of the person who has signed for accommodation should depend upon the reasonable understanding of the parties to the transaction. This is recognized by the English courts, for the

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[7] Campbell *v.* Dearborn, 109 Mass. 130. The Kentucky court is consistent and has not followed these decisions. Manford *v.* Green's Adm'r, 44 S. W. Rep. 419.

[8] Rasdall *v.* Rasdall, 9 Wis. 379, 391.

[9] See Ryan *v.* Dox, 34 N. Y. 306, 319.

[1] Kellog *v.* Barton, 12 Allen (Mass.) 527; Chester *v.* Dorr, 41 N. Y. 279; Peale *v.* Addicks, 174 Pa. St. 549; Cottrell *v.* Watkins, 89 Va. 801.

[2] Charles *v.* Marsden, 1 Taunt. 224; Carruthers *v.* West, 11 Q. B. 143.

[3] Dunn *v.* Weston, 71 Me. 270; Miller *v.* Larned, 103 Ill. 562, 570. Of the American cases cited by the court only the above are square decisions. Harrington *v.* Dorr, 33 Rob. (N. Y.) 275, cited by the court, was reversed on appeal. Chester *v.* Dorr, *supra.* Davis *v.* Miller, 14 Gratt. (Va.) 1, was overruled by Cottrell *v.* Watkins, *supra.*

[4] See Peale *v.* Addicks, *supra.*